No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, et al.,
Petitioners,

v.

STATE OF NEW YORK, et al.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF HISTORIANS AND SOCIAL SCIENTISTS MARGO ANDERSON, ANDREW BEVERIDGE, RACHEL BUFF, MORGAN KOUSSER, MAE NGAI, AND STEVEN RUGGLES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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April 1, 2019

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INTEREST OF AMICI CURIAE[1]

In a related proceeding in this matter, Justices Gorsuch and Thomas issued a memorandum opinion, the second sentence of which begins with the phrase, "Most censuses in our history have asked about citizenship ...." *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (mem.) (Gorsuch, J., concurring in part and dissenting in part). And the Secretary of Commerce argues here that "to reinstate to the decennial census a question whose pedigree dates back nearly 200 years" simply "cannot be arbitrary and capricious." Petitioners Br. 28. These arguments have placed the history of the census at the front and center of this case. *Amici* respectfully urge the Court to consider that history carefully before reaching any conclusions about whether it supports or undermines the Secretary's decision to add a citizenship question to the 2020 census.

Amici are scholars of the census and immigration—historians and social scientists—who aim to assist the Court by providing relevant information about the census and how it has evolved throughout our nation's history.

Margo Anderson is a leading historian of the census and Distinguished Professor Emerita in History and Urban Studies at the University of Wisconsin, Milwaukee. She has written numerous

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[1] Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents.

articles and books about the history of the census, a list of which appears at margoanderson.org.

Andrew Beveridge is Professor of Sociology at Queens College and the CUNY Graduate Center. He is CEO of Social Explorer, which provides census data to millions, and he regularly provides analyses of census data to leading news organizations.

Rachel Buff is Professor of History and Director of the Cultures and Communities Program at the University of Wisconsin, Milwaukee. She specializes in the history of immigration, immigrant rights, and citizenship.

J. Morgan Kousser is Professor of History and Social Science at the California Institute of Technology. Most of his work has concerned minority voting rights and the legal and political aspects of race relations in the 19th and 20th centuries.

Mae Ngai is the Lung Family Professor of Asian American Studies and Professor of History and is a U.S. legal and political historian who specializes in studies of immigration, citizenship, and nationalism.

Steven Ruggles is Regents Professor of History and Population Studies at the University of Minnesota, and the Director of the Institute for Social Research and Data Innovation. He is best known as the creator of IPUMS, the world's largest population database.

SUMMARY OF ARGUMENT

The Secretary of Commerce argues that his decision to seek the citizenship status of everyone in the United States merely represents a return to past practice. His argument finds no support in the history of the census.

The government has never asked for the citizenship status of everyone in the country. Moreover, the census has changed enormously over time, such that a decision made in the distant past to ask a citizenship question is not comparable to a decision to ask a citizenship question today. And in the modern era, the government has consistently rejected suggestions to add a citizenship question to the short-form survey sent to all households. In short, the pre-1960s census practice on which the Secretary relies is inapposite because the census has changed so much since then, and his decision defies post-1960s practice, which is most relevant today. As a result, the Secretary's argument that his decision merely reinstates a citizenship question is misleading and should not serve as a basis for disturbing the judgment of the district court.

ARGUMENT

I. The Census and Its Citizenship Questions Have Evolved Significantly Over the Course of American History

The Secretary has promoted a historical narrative in which adding a citizenship question to the universal 2020 census form merely "represents a

return to the status quo." Petitioners Br. 39. But this narrative is deeply flawed. Understanding how the census has developed to fulfill its constitutional mandate to count the population is crucial to evaluating the Secretary's claim. At a minimum, one needs to understand how an instrument that counted 3.9 million people by hand in 1790 has successfully modernized to count a population approaching 330 million using advanced statistical techniques, testing and evaluation, and computerized data collection, tabulation, and publication methods.

The census has evolved significantly from its humble origins as a congressional project conducted by U.S. marshals and a few clerks to the massive and complex data-gathering initiative run through the permanent institution that now resides in Suitland, Maryland. That evolution was the product of many changes over time:

Origins as a Simple Count. The censuses from 1790 to 1840 were household counts, asking for the name of the household head only, and asking for the number of other people in the household in various demographic, economic, or social categories. This system allowed for basic tabulation in the field by assistants to the U.S. marshals, who collected the data for their local area, summed it up, and sent their reports to Washington D.C. A small office with a few clerks then totaled these reports for the national report.

Transition to an Individual-Level Inquiry. In 1850, Congress authorized the individual-level census, giving every resident a line on a census form

and adding many new questions for both individuals and businesses. That change also required the establishment of a large temporary office in Washington to tabulate the results, still by hand, and produce the published reports.

Incorporation of New Data-Processing Technology. Swamped by the expanding data collection required of it, the Census Office introduced machine tabulation of data in 1890.

Institutionalization and Empowerment of the Census Bureau. In 1902, Congress made the Census Office a permanent federal agency (the Census Bureau) and housed it in the Commerce Department. The institutionalization of the Bureau allowed it to develop specialized expertise and new methods of conducting the census and processing the gathered information. Recognizing this expertise, Congress in 1929 authorized the Census Director to determine the form and content of the census schedules.

Incorporation of Social Science Innovations. In 1940, the Census Bureau introduced probability sampling into the census process, which would change the way most census questions were asked. And in 1950, it commissioned the first non-defense computer to tabulate the results.

Separation of the Enumeration from Other Data Gathering. In 1960, the Bureau split the census questionnaire into a "short form" for all households that contained a small number of questions that the Bureau deemed relevant to the enumeration and a "long form" for a sample subset of

households that contained questions relating to the Bureau's other data-gathering interests.

Introduction of Self-Enumeration. In 1970, the Bureau introduced the "mail census," allowing for census respondents to enumerate themselves on a grand scale for the first time, rather than relying on door-to-door enumeration in the first instance.

Introduction of Continuous Measurement. In 2000, the Bureau tested replacing the long-form sample with a continuous measurement survey, the American Community Survey. In the 2000s, the ACS replaced the long-form questionnaire, and the 2010 census was a short-form census only.

The end product of these and other accumulated changes is a contemporary census that is substantially and materially different from the census's earlier iterations and that operates in a greatly changed social, political, and demographic environment. With these developments in mind, *amici* offer the Court a deeper, more detailed account of the census's origins and evolution that undergirds their evaluation of the accuracy of Secretary Ross's historical defenses.

A. Nineteenth Century Censuses

The Constitution has required a census since the nation's founding. Art. I, § 2, cl. 3. The first, conducted in 1790, consisted of only six questions of household heads that U.S. Marshals and their

assistants narrated to survey respondents in person.[2] For each family, the assistant marshal listed the name of the household head, the number of white males sixteen and older, the number of white males under sixteen, the number of free white females, the number of other free persons, and the number of slaves. The marshals sent the responses to the office of the Secretary of State, which totaled the numbers and reported them to Congress for the decennial apportionment. Congress soon recognized, however, that it could use the decennial survey for gathering demographic and economic information in addition to conducting the required counts for apportionment purposes. By the fourth census in 1820, for example, Congress asked for detailed information on the number of people in a household in various age, race, and gender categories, and the number of persons engaged in "Agriculture," "Commerce," and "Manufactures" in a household, as well as the number of "Foreigners not naturalized."[3]

In 1830, for the first time, the Secretary of State printed forms to be used for the census and sent them to the marshals and their assistants.[4] A protean

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[2] U.S. Dep't of Commerce, Bureau of the Census, 1790 Overview, www.census.gov/history/www/through_the_decades/overview/1790.html.

[3] Act of Mar. 14, 1820 (to provide for taking the fourth census, or enumeration of the inhabitants of the United States, and for other purposes), ch. 24, § 1, 3 Stat. 548, 548-555.

[4] U.S. Dep't of Commerce, Bureau of the Census, Census Instructions, www.census.gov/history/www/through_the_decades/census_instructions/.

census office consisting of a clerk or two modified the census questions on the forms, clarifying, for example, that a question for "ALIENS—foreigners not naturalized" applied to "White Persons" only.[5] Additional questions were added in the following years, but census questions relating to citizenship, alien status, or naturalization disappeared entirely for several decades. The census surveys for 1840, 1850, 1860, and 1880 did not ask any such questions.[6]

Congress revised census procedures dramatically in 1850 to collect an even larger quantity of information. Congress's 1850 census statute required census-takers to obtain individualized answers for each household resident to an expanded set of questions, including place of birth, occupation (for adult men), marital status, literacy, and disability.[7] Congress also mandated separate schedules for censuses of agriculture, manufacturing, and mortality to be collected along with the population count.[8] And for the first time, a substantial census

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[5] U.S. Dep't of Commerce, Bureau of the Census, 1830 Overview, www.census.gov/history/pdf/1830-2-042018.pdf.

[6] Carroll Wright & William C. Hunt, *History and Growth of the U.S. Census* 90, 92 (Washington, D.C.: GPO 1900), www.census.gov/history/pdf/wright-hunt.pdf.

[7] J.D.B. DeBow, *Statistical View of the United States: A Compendium of the Seventh Census* 12 (1854), www.census.gov/library/publications/1854/dec/1850c.html.

[8] Miriam D. Rosenthal, *Striving for Perfection: A Brief History of Advances and Undercounts in the U.S. Census*, 17 Gov't Info. Q. 193, 198 (2000).

office in Washington D.C. tabulated the survey results.[9] The Interior Department housed this new (but temporary) Census Office.[10]

Throughout the 1800s, census administration grew increasingly burdensome as Congress required administrators to collect and tabulate more and more data—a period described by former Census Bureau statistician Miriam D. Rosenthal as a time of "re-enumerations, protracted enumeration periods, lengthy questionnaires, poor questionnaire design, nepotism and bureaucracy."[11] By 1880, as the U.S. population topped 50 million, including 6.7 million foreign-born residents, the Census Office was still tabulating by hand. It took most of the decade to tabulate and publish the dozens of reports from the decennial count. The census had grown in complexity so much that it was essentially inadministrable.[12] The 1890 census, for instance, contained over 13,000 possible questions among the different census schedules, and the government took nearly seven years to publish the results.[13]

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[9] Margo J. Anderson, The American Census: A Social History 42 (2d ed. 2015).

[10] Constance F. Citro, "Content Determination," in *Encyclopedia of the U.S. Census from the Constitution to the American Community Survey* 105 (Margo J. Anderson et al. eds., 2012).

[11] Rosenthal, *Striving for Perfection*, *supra*, at 197.

[12] *Informal Hearing on January 9, 1897, before the Comm. on the Census*, 54th Cong. 2d Sess., Doc. No. 68, at 16 (1897).

[13] Michael R. Lavin, *Understanding the Census: A Guide For Marketers, Planners, Grant Writers and Other Data Users* 21

As the Census Office grappled with the burdens of the tabulation process, it pursued technical solutions. For example, in 1890, mechanical punch-card tabulation replaced hand counting of the census results. This focus on administrative reform and technical innovation would continue throughout the 1900s and would later drive the overhaul of the census system in the 1950s.[14]

B. The Turn-of-the-Century Creation of the Census Bureau

Responding to the many difficulties in administering the census in the nineteenth century, Congress sought to improve census administration. In 1902, Congress replaced the temporary Census Office with a "permanent" one.[15] At the same time, Congress recognized that its sprawling data collection mandates had diminished the efficiency and efficacy of the census.[16] In the 1902 Act, for example, it shifted the manufacturing survey to a year between the decennial population counts.[17] In 1919, Congress limited the types of information that

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(1996); Wright & Hunt, *History and Growth of the United States Census*, *supra*, at 75.

[14] U.S. Dep't of Commerce, Bureau of the Census, Hollerith Machine, www.census.gov/history/www/innovations/technology/the_hollerith_tabulator.html.

[15] Act of Mar. 6, 1902 (To provide for a permanent Census Office), Pub. L. No. 57-27, 32 Stat. 51.

[16] Rosenthal, *Striving for Perfection*, *supra*, at 197-98.

[17] Act of Mar. 6, 1902, Pub. L. No. 57-27 § 9, 32 Stat. 52-53.

the Census Bureau could collect in the decennial census.[18]

By creating a permanent Census Bureau, Congress enabled dedicated career employees to develop specialized expertise, undertake methodological research, and publish analytical reports.[19] In short, it created an institution with a statutory mandate and vision that allowed it to see beyond the pressures of the moment and to focus on the science of accurately counting and describing the characteristics of the still-growing, geographically dispersed, and diverse American population—a population that topped 76 million in 1900 and reached almost 123 million in 1930.

In 1929, Congress further acknowledged the role of the Bureau's expertise in census administration when it authorized the Census Director, with the approval of the Commerce Secretary, to determine the "number, form and sub division of inquiries in the schedules."[20] That authorization empowered the agency to develop processes to guarantee accurate and relevant question formats and methods of administration, and ultimately to introduce

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[18] Act of Mar. 3, 1919 (To provide for the fourteenth and subsequent decennial censuses), Pub. L. No. 65-325 § 8, 40 Stat. 1291, 1294.

[19] Factfinder for the Nation: History and Organization, https://www.census.gov/history/pdf/cff4.pdf.

[20] Act of June 18, 1929 (To provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress), Pub. L. No. 71-13, 46 Stat. 21.

probability sampling into the census and conduct research to test and evaluate the quality of all census inquiries.

The introduction of the full-time Census Bureau and the passage of legislation limiting the topics appearing on the decennial questionnaire did not, however, eliminate the pressure on the Bureau to add more questions and explore more subject matter. The census continued to struggle with overly ambitious information-gathering goals, substantial respondent burdens, and troubling accuracy issues. For example, the 1930 census added questions on unemployment—a hot-button issue in the context of the Great Depression—and in 1939, Congress mandated a new elaborate Housing Census to be added to the 1940 count.[21]

Census questions tend to reflect the changing demography of the country and concomitant policy issues. In the late nineteenth and first half of the twentieth century, questions regarding immigration and assimilation became the focus of attention in the census. Censuses since the 1850 count had asked a question about place of birth of residents. But in 1890, the census added a series of questions about assimilation, including the naturalization status of adult men and the number of years they had been in the U.S. These questions were expanded to include

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[21] Margo J. Anderson, The American Census: A Social History 181 (2d ed. 2015); U.S. Dep't of Commerce, Bureau of the Census, *200 Years of U.S. Census Taking: Population and Housing Questions, 1790-1990*, at 60-72 (Nov. 1989), https://www.census.gov/history/pdf/200years.pdf.

mother tongue and parental mother tongue, and by 1920 were asked of all the foreign-born population. With varying language, they remained on the census schedule through the 1950 census.

C. The Statistical Revolution and the Shift to Probability Sampling

The Census Bureau of the early twentieth century was part of a larger scientific world working on ways to improve social science data collection and production. The Bureau's emerging survey expertise coincided with a revolution in statistical practice across federal agencies.[22] In 1933, the Committee on Government Statistics and Information Services (COGSIS) was formed. That year, COGSIS analyzed the Bureau's practices and recommended that several questions—including citizenship questions—be eliminated from future censuses, either in whole or in part.[23]

At the same time, COGSIS and other agencies were testing and developing new research techniques—most notably, probability sampling (methods for ascertaining information about a population based on a subset of the population) and standardized post-enumeration tools to measure

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[22] Rosenthal, *Striving for Perfection*, *supra*, at 205-06.

[23] Soc. Sci. Research Council, *Government Statistics: A Report of the Committee on Government Statistics and Information Services* 77, 82 (Apr. 1937), bit.ly/2YBoq6s.

undercounts (*i.e.*, how many people were missing from the initial census count).[24]

After the successful use of probability sampling to measure unemployment, particularly in a 1937 Unemployment Census, the Census Bureau utilized sampling in the 1940 and 1950 censuses, collecting information from samples of three, five, and twenty percent of the population.[25] The 1950 census demonstrated the reliability of probability sampling: in the post-1950 census evaluation studies, the Bureau found that the sample data was of higher quality than the complete-count data.[26]

Probability-sampling methodology made scientific analysis of census accuracy possible, and in 1950 the Bureau added a "post enumeration survey" to the decennial design to test for accuracy of the count. Given the scope of the census, officials had long known that some amount of overcounting and undercounting occurred, but it was not until the advent of sampling that the Bureau gained the technical capacity to measure overall census error using post-enumeration surveys and demographic

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[24] Rosenthal, *Striving for Perfection*, *supra*, at 200-02.

[25] Michael R. Lavin, *Understanding the Census: A Guide For Marketers, Planners, Grant Writers and Other Data Users* 56 (1996); Joseph W. Duncan & William C. Shelton, Revolution in United States Government Statistics 61 (1978).

[26] Duncan & Shelton, Revolution in United States Government Statistics, *supra*, at 64.

analyses.[27] The 1950 census was the first that the Bureau evaluated with the benefit of a post-enumeration survey that scientifically estimated undercounts at the national level.[28] The post-1950 analyses showed not only an estimated net undercount of 5 to 5.5 million people, but also a racially differential undercount (*i.e.*, an undercount of minority communities at a higher rate than white communities).[29] The post-enumeration analysis also provided estimates of classification errors for particular questions, including that about eight percent of the reported citizenship responses of the foreign-born were likely erroneous.[30]

These statistical developments led to a radical change in the census. The Bureau determined that it could collect more accurate information, eliminate three-fourths of processing expenses, and reduce the burden on respondents by moving most of the questions on the existing complete-count form to an

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[27] Rosenthal, *Striving for Perfection*, *supra*, at 202; Margo Anderson & Stephen E. Fienberg, *Who Counts? The Politics of Census-Taking in Contemporary America* 29-30 (1999).

[28] Rosenthal, *Striving for Perfection*, *supra*, at 202.

[29] Edwin D. Goldfield & David M. Pemberton, "Decennial Censuses: 1950," in *Encyclopedia of the U.S. Census From the Constitution to the American Community Survey* 153 (Margo J. Anderson et al. eds., 2012); Anderson & Fienberg, *Who Counts?*, *supra*, at 30-31.

[30] U.S. Dep't of Commerce, Bureau of the Census, 1950 Census of Population, Volume IV, Special Reports, No. 3A, Nativity and Parentage, 3A-6, www2.census.gov/library/publications/decennial/1950/population-volume-4/41601756v4p3.pdf.

expanded sample questionnaire.[31] By 1960, therefore, the Bureau split the census into two different forms: the short-form questionnaire, which was used for all households and had only the most basic questions necessary to conduct a complete count of the population for apportionment, and a long-form questionnaire, which added dozens of additional questions for a sample of housing units. The Bureau also eliminated questions that no longer seemed relevant even for the long form, including the citizenship question in 1960.[32]

The 1950 census had reported that 80 percent of the foreign-born population were citizens, that only 6.9 percent of the population was foreign-born in 1950, and that the proportion of the foreign-born population had been declining for 50 years; it simply did not seem very important to retain the question on the decennial census. The Bureau noted at the time that citizenship information "had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for annual alien registration which could provide the Immigration

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[31] *Plans for Taking the 1960 Census: Hearing before the Subcomm. on Census & Gov't Statistics, H. Comm. on Post Office & Civil Serv.*, 86th Cong. 5-6 (1959).

[32] U.S. Dep't of Commerce, Bureau of the Census, *Index of Questions 1960 (Population)*, www.census.gov/history/www/through_the_decades/index_of_questions/1960_population.html.

and Naturalization Service, the principal user of such data, with the information it needed."[33]

In sum, after many decades of technical innovation, the Bureau largely solved the administrability problems that had long plagued the Bureau as it labored under pressure to produce too much data with too little time. The Bureau determined that it could both conduct the census *and* gather information more effectively if it used a short form for counting and a longer form coupled with sampling techniques for gathering demographic information. In 1957, Congress recognized the change and authorized the bureau to use "sampling procedures."[34] Thereafter, detailed questions have been found on the sample survey directed to small subsets of the population.[35]

Additional innovations followed. In 1970, the bureau initiated the mail census. In the 1980s, it developed a computerized map of the country and a master address file to administer the count (the TIGER/MAF system). These changes marked the

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[33] U.S. Dep't of Commerce, Bureau of the Census, *1960 Censuses of Population and Housing: Procedural History* 194 (Mar. 1966), www2.census.gov/prod2/decennial/documents/1960/proceduralHistory/1960proceduralhistory.zip.

[34] Act of Aug. 28, 1957 (To amend certain sections of title 13 of the United States Code, entitled "Census"), Pub. L. No. 85–207, § 195, 71 Stat. 481, 484.

[35] Edwin D. Goldfield & David M. Pemberton, "Decennial Censuses: 1960 Census," in *Encyclopedia of the U.S. Census from the Constitution to the American Community Survey* 155 (Margo J. Anderson et al. eds., 2012).

transition to a new, modern era of census history that bears little resemblance to the census that came before.

D. Censuses Since the Shift to Modern Probability Sampling Techniques

The paradigm shift in census-taking practices since the 1960s has invested great significance in whether a question is located on the complete-count survey or the sample survey. Questions about occupation, education, migration, disability, and veteran status, for example, are not essential to the basic count for apportionment. They, like citizenship, are questions for the long form or ACS.[36] From 1960 to the present day, the short form has never included citizenship questions.

With the passage of the 1965 Immigration and Naturalization Act and the restructure of the immigration system, Congress heard renewed interest in collecting citizenship data in some form. Some members of Congress and other federal agencies advocated for the placement of a citizenship question on the 1970 census.[37] The Bureau did not

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[36] Constance Citro, "Long Form," in *Encyclopedia of the U.S. Census, 2d ed.* 305-308 (Washington, D.C.: CQ Press 2000), contains a table of questions on the long form.

[37] *Limit Categories of Questions in Decennial Censuses: Hearing before the Subcomm. on Census & Statistics of the H. Comm. on Post Office & Civil Serv.*, 90th Cong. 81 (1967), congressional-proquest-com.proxy.library.nyu.edu/congressional/docview/t29.d30.hrg-1967-poh-0029?accountid=12768 (statement of Rep. Arnold Olsen).

include the citizenship question on the short form but did include it on the smallest of the three long-form surveys, sent to five percent of households.[38]

Before the 1980 census, the issue of identifying citizens and aliens on the census again arose, this time in the context of identifying the undocumented or illegal alien population. Senate bill S. 2366 proposed that "[t]he Secretary shall make such adjustments in total population figures as may be necessary, using such methods and procedures as he determines appropriate, so that aliens in the United States in violation of the immigration laws shall not be counted in tabulating population for purposes of sub-sections [apportionment]." Such legislation would not only have required a universal question on an individual's citizenship, it would also have required the Bureau to identify immigrants in the country illegally.[39] The Bureau again opposed adding citizenship questions to the short-form census, explaining that "[a]ny effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count," in large part because "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitably trigger

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[38] Edwin D. Goldfield, *Relevant Data for Political Science in the 1970 Census*, 3 PS 308-14 (Summer 1969), https://www.jstor.org/stable/418367.

[39] *1980 Census: Counting Illegal Aliens: Hearing before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the S. Comm. on Governmental Affairs on S. 2366*, 96th Cong. 68 (1980) (statement of Vincent Barabba, Director, U.S. Census Bureau).

hostility, resentment and refusal to cooperate."[40] A citizenship question remained on the long-form census; Congress did not enact S. 2366.

When the issue arose yet again before the 1990 census, Bureau Director John Keane echoed the concerns of his predecessors and testified against adding a citizenship question to the short-form census:

> [T]he Constitution requires that we enumerate residents. Even if the Congress and the states were to change this requirement, technical and practical considerations must be addressed. We would be required to ask every person a citizenship question, and then determine the legal status of each one. This involves legal considerations for which the Census Bureau has neither expertise nor responsibility. Furthermore, the Census Bureau could be perceived as an enforcement agency, and this could have a major effect on census coverage.[41]

The Bureau adhered to this position; although it modified the wording of the citizenship question and

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[40] *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980).

[41] *Enumeration of Undocumented Aliens in the Decennial Census: Hearing before the Subcomm. on Energy, Nuclear Proliferation, & Gov't Processes., S. Comm. on Governmental Affairs*, 99th Cong. 31-32 (1985) (statement of John Keane, Director, U.S. Census Bureau).

expanded its coverage to all sample households, it did not add the question to the short form.[42]

The 1990 version of the citizenship question appeared on the long-form census questionnaire in 2000 as well. In 2005, the American Community Survey (ACS), a sample survey sent to about 3.5 million addresses per year, replaced the long form.[43] The citizenship question was moved to the ACS in the same form in which it had appeared on the long-form survey, and it has remained there since.[44]

Ultimately, the Bureau consistently—over the course of decades and different Directors—chose to present questions of citizenship and other socioeconomic topics not necessary to count the population only on sample surveys. These decisions were driven by the concern that moving the citizenship question to the complete-count census form would jeopardize the accuracy of census results and thus the core function of the census.

II. The Secretary's Assertion That He Decided to "Reinstate" a Citizenship Question Is Misleading

The Secretary's assertion that he decided to "reinstate" a citizenship question "whose pedigree

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[42] U.S. Dep't of Commerce, Bureau of the Census, *1990 Census of Population and Housing – History* 1-14 to 1-20 (1996); https://www.census.gov/history/pdf/1990proceduralhistory.pdf.

[43] U.S. Census Bureau, American Community Survey, Design and Methodology, at 1, 32 (Jan. 2014).

[44] *Id.* at 72.

dates back nearly 200 years" is misleading for three reasons: (1) it suggests that the planned universal question is no different from past practice, when in fact a citizenship question has never been asked of everyone; (2) it treats census history as static and fails to account for a material, paradigmatic shift in census practice in the mid-twentieth century driven by probability sampling techniques, among other innovations; and (3) it ignores the Bureau's consistent decisions not to include a citizenship question on the questionnaire sent to all households after 1950.

A. The Census Bureau Has Never Asked for the Citizenship Status of Everyone in the United States

The Secretary repeatedly justifies his decision to "reinstate" a universal citizenship question to the short-form census survey by citing historical instances in which a citizenship question or citizenship-related question appeared on the survey. But the Secretary's sweeping references to the question's "pedigree" gloss over the fact that the government has never asked for the citizenship status of every identified individual in the country.[45] Rather, throughout history, the government has asked only a subset of the population to provide citizenship information.

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[45] Thomas P. Wolf & Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 Georgetown L.J. Online 5, 13 (2019), bit.ly/2WC5d2Q.

In 1820 and 1830, the government asked the head of household to state the number (but not the name) of "foreigners not naturalized." Thus, the 1820 and 1830 censuses did not identify non-citizens on an individual level.[46] In 1870, the government asked for the citizenship status of males of 21 years of age and older.[47] In the late nineteenth and early twentieth century, the government asked only foreign-born men over the age of 21 for their citizenship status.[48] Finally, from 1930 to 1950, the government asked for the naturalization status of all foreign-born people in the survey respondent's household. Even then, the questions and mode of presentation were different from those that the Secretary has decided to ask about everyone in the United States in the form of a "citizenship question."

From 1930 to 1950, census-takers still went door to door, narrating questions to heads of household. The census survey in those decades asked for the birthplace of each household member. If the resident was born in the United States, no "naturalization" question was asked.[49] After the overhaul of the census system in the 1950s, as noted, the Census

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[46] Wolf & Cea, *A Critical History*, *supra*, at 20 & appendix.

[47] *Id.* at 13, 20 & appendix.

[48] *Id.* at 13, 20 & appendix; *Eleventh Census of the United States, Instructions to Enumerators*, June 1, 1890 ("Inquiries [about naturalization] should be made concerning only those adult *males* of foreign birth who are 21 years of age or over." (emphasis in original)), www.census.gov/history/pdf/1890instructions.pdf.

[49] Wolf & Cea, *A Critical History*, *supra*, at 14-15.

Bureau determined that it could pursue the twin goals of counting the population and collecting information more effectively through sampling. Thus, the citizenship question and a whole host of other questions disappeared from the 1960 census. And from 1970 onward, the question has never appeared on the short-form questionnaire sent to all households; it has instead appeared only on sample surveys (the long-form questionnaire and ACS) sent to a fraction of the population.

The distinction between gathering census information from everyone and gathering census information from a subset of the population, respectively, is significant, *i.e.*, the Court should not conclude that "universal" questions are the same as questions designated for a smaller part of the whole. The decision to ask only a subset of the population for information reflects one of two conclusions: the decision-maker either believed that it had no need to gather the information for everyone or, conversely, it believed that it could gather the information for everyone most effectively by polling only the subset. Either way, the historical practice of asking a subset of the population for information provides no support for the Secretary's present-day assertion that a universal question is necessary and effective.

In short, and contrary to the Secretary's litigation position, never in the census's 230-year history has the government asked for the citizenship status of everyone in the country. Quite simply: There is no historical precedent for a universal citizenship question.

B. The Secretary's Comparisons with Pre-1960s Practices Are Inapt

Petitioners repeatedly argue that the Secretary decided only to "reinstate" a citizenship question, thereby returning the Bureau to past practices. Petitioners Br. 3, 8, 11, 12, 17, 24, 28. This argument is misguided because the past practices with which he seeks to compare his decision no longer exist. Thus, his comparison takes place in a vacuum, without regard for context, and his invocations of historical pedigree are strikingly ahistorical.

The Census Bureau may not have "split the atom of sovereignty" [*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)], but it did split the decennial census in two when it created the short-form and long-form census questionnaires. The resulting census system was "unprecedented in form and design." *Ibid.* And after change comes, as the title of the book has it, "You Can't Go Home Again." Thomas Wolfe (Harper & Bros. 1940).

The Secretary implicitly portrays census history as a static and unchanging hometown to which he can return. But the census has evolved significantly over time. Thus, even if the government routinely asked everyone for their citizenship status before 1960 (it did not), the Secretary could not rely on such history because doing so requires relying on an entire body of census practice that the Bureau specifically rejected as inadequate for obtaining an accurate population count.

The development of statistical expertise and new methodologies permitted the Bureau in the 1950s to reconsider its prior practices. In particular, post-enumeration surveys illuminated the extent of the undercounting of prior censuses, and the development of probability sampling provided a better method of gathering types of information that were not necessary for enumerating the population.[50] Armed with this new knowledge and these new techniques, the Bureau responded by radically changing how the census is conducted, creating a short form to conduct the enumeration and a long form also containing all other questions, including citizenship (when it was later added).[51] The Bureau determined that this method would collect accurate information at lower expense and burden.[52]

This history is not mere background; it has critical importance in this case. Specifically, the fact that the census system was substantially different before and after 1960 means that the Secretary should not draw on pre-1960 census history to support his assertion that there is historical support

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[50] Rosenthal, *Striving for Perfection*, *supra*, at 202; Anderson & Fienberg, *Who Counts?*, *supra*, at 29.

[51] *Plans for Taking the 1960 Census: Hearing before the Subcomm. on Census & Gov't Statistics*, 86th Cong., at 5-6; U.S. Census Bureau, *Index of Questions 1960 (Population)*, https://www.census.gov/history/www/through_the_decades/index_of_questions/1960_population.html.

[52] *Plans for Taking the 1960 Census: Hearing before the Subcomm. on Census & Gov't Statistics*, 86th Cong., at 5-6.

for adding a universal citizenship question to the 2020 census.

C. The Secretary's Decision Defies the Post-1960s History of the Census

So long as the Census Bureau has used short- and long-form questionnaires, citizenship questions have appeared only on the long form or ACS. This did not happen by chance. In the late 1970s and 1980s, when members of Congress and organizations protesting undocumented immigration pressed the Census Bureau to add a universal question identifying Americans by citizenship and immigration status on the decennial census, the Bureau explained its procedures for testing and evaluating such a proposal, and strongly cautioned against putting the question on the short form.

The Bureau has explained that questions cannot be swapped in and out of surveys without rigorous testing.[53] The precise content and sequence of questions, the method of administration, and the particular environment in which the survey is administered all affect the results. And the available limited testing of the citizenship question indicated to Bureau officials that they would need to explore and resolve potential issues of bias and accuracy before placing such a question on the short form.[54]

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[53] Letter from Former Directors of the U.S. Census Bureau to Wilbur Ross, Sec'y of Commerce, U.S. Dep't of Commerce (Jan. 26, 2018), wapo.st/2YFBWpx.

[54] Justin Levitt, *Citizenship and the Census*, 119 Colum. L. Rev. __ (forthcoming 2019), manuscript 12, bit.ly/2YDWyPd.

Even subtle changes in language and instructions have affected responses in the past. For example, when the 1980 census included slightly different instructions and response options for a citizenship question on the long-form questionnaire, the result was a high rate of erroneous entries—22 percent of people who stated that they were born in the United States also stated that they were "naturalized citizens."[55] The Bureau revised the question for the 1990 census, but the revision simultaneously increased the burden of responding and caused a higher non-response rate.[56]

Recent studies of non-response or misreporting associated with the citizenship question indicate that some issues of bias remain.[57] And unlike other census questions, citizenship has been the subject of much more limited technical and cognitive research to resolve the issues.[58] Because Congress did not raise

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[55] U.S. Dep't of Commerce, Bureau of the Census, 1990 Census of Population and Housing, History 14-20 (1996), www.census.gov/history/pdf/1990proceduralhistory.pdf.

[56] U.S. Bureau of the Census, *1990 Census of Population and Housing, Content Determination Reports: Birthplace, Citizenship, Year of Entry, and Language, 1990 CDR-7* at 11-12 (Washington, D.C.: GPO October 1990).

[57] 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Focus Group Final Report, A New Design for the 21st Century, 67-68, www2.census.gov/programs surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-focus-group.pdf.

[58] Margo Anderson & Stephen E. Fienberg, *Who Counts? The Politics of Census Taking in Contemporary America* 34 (New York: Russell Sage Foundation, rev. ed. 2001).

the issue of counting non-citizens (or otherwise adding citizenship to the short form) in the 2000 census, and no further litigation on the issue occurred in 2000 or 2010, the Bureau has not had occasion to produce in-depth research into citizenship data akin to the research it has produced on differential undercount measurement.[59]

The fact that the Bureau has repeatedly recognized that it cannot add a citizenship question to the short form without rigorous testing does not mean that the question had no value on the long form or ACS, which is a different type of survey. The Bureau's statistical analysis in the post-1960s era has shown that sampling produces data of sufficient quality for program administration.[60] For example, since the Voting Rights Act was enacted in 1965,

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[59] For an illustration of the kind of research that will be required to analyze the question adequately, see "Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census," CES18-38, by the Bureau's Center for Economic Analysis researchers, J. David Brown, Misty L. Heggeness, M. Dorinski, Lawrence Warren, and Moises Yi (Aug. 2018), www2.census.gov/ces/wp/2018/CES-WP-18-38.pdf.

Their paper examines the quality of citizenship data in self-reported survey responses compared to administrative records and evaluates options for constructing an accurate count of resident U.S. citizens. They conclude that the evidence suggests that "adding a citizenship question to the 2020 Census would lead to lower self-response rates in households potentially containing noncitizens, resulting in higher fieldwork costs and a lower-quality population count."

[60] Duncan & Shelton, Revolution in United States Government Statistics, *supra*, at 64.

survey data on citizenship from the long form and ACS have been sufficient for successful enforcement of the Act,[61] a fact recognized by voting-rights groups.[62]

But the usefulness of citizenship information obtained in a sample survey does not mean that the question can be reliably shifted to the short form without testing for a complete-count environment. Complete-count data collections may raise privacy concerns from respondents who ask whether their responses will be linked to other government data and systems. Statutory confidentiality restrictions protect all census responses from disclosure, but the Bureau has not tested a complete-count citizenship question to determine if it would lead to non-response and thus vitiate the quality of the overall census. And "it is shoddy science to simply assert that testing decades ago on a much longer instrument delivered to a much smaller sample population will accurately anticipate the impact of the question on a ten-question survey delivered in the present climate to every household in the country."[63]

Prior Census Bureau Directors have opposed adding a citizenship question to the short-form questionnaire precisely because the question could

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[61] Levitt, *Citizenship and the Census*, *supra*, at 12, 24.

[62] *Id.* at 12, 27-28; Brief of the Leadership Conference on Civil and Human Rights, et al., at 10-12, *State of California v. Ross*, No. 18-CV-01865 (N.D. Cal. July 24, 2018) (ECF No. 60-1).

[63] Levitt, *Citizenship and the Census*, *supra*, at 16 n.64.

cause inaccurate results. Before the 1980 census, the Bureau opposed the addition of a citizenship question because "[a]ny effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count."[64] And as noted, Bureau Directors Vincent Barabba and John Keane both explained that adding the citizenship question could lead respondents to view the census as having a law-enforcement function, which could trigger hostility and refusal to cooperate in certain communities.[65]

The Bureau, with its extensive expertise and statistical evaluation of census questions, has consistently cautioned against including a citizenship question on the short form, explaining that doing so—at least without careful testing and analysis—would create serious data accuracy and reliability problems for the entire census. This Court should consider the Bureau's consistent post-1960s assessment that adding a census question in the manner that the Secretary proposes would impair the Bureau's ability to discharge its constitutional and statutory census function. The Secretary's last-minute 2018 decision to add an untested citizenship question defies that history, and should not be viewed as reinstating a past practice or returning the Bureau to the traditional status quo.

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[64] *Klutznick*, 486 F. Supp. at 568.

[65] *See supra*, at 19-20.

CONCLUSION

Our history does not support petitioners' argument that adding a citizenship question to the 2020 short-form census questionnaire would represent a return to the status quo or a reinstatement of past practice.

Dated: April 1, 2019

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